

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6126
DATE COMPLAINT FILED: October 31, 2008
DATE OF NOTIFICATION: November 7, 2008
DATE OF LAST RESPONSE: January 5, 2009
DATE ACTIVATED: March 23, 2009

EXPIRATION OF SOL: October 14, 2013

COMPLAINANT:

Re-elect Congressman Kucinich Committee

RESPONDENTS:

Republican Senate Campaign Committee and
J. Matthew Yuskewich, in his official capacity
as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(22)
2 U.S.C. § 434(f)
2 U.S.C. § 441i
2 U.S.C. § 441d
11 C.F.R. § 100.29
11 C.F.R. § 104.20
11 C.F.R. § 106.1
11 C.F.R. § 110.11
11 C.F.R. § 300.61

INTERNAL REPORTS CHECKED:

Disclosure Reports

OTHER AGENCIES CHECKED:

Ohio Secretary of State Election Division

I. INTRODUCTION

The complaint alleges that the Republican Senate Campaign Committee, a legislative campaign fund registered in Ohio ("RSCC" or "Respondents"), funded the production and broadcast of an "electioneering communication" and failed to disclose the communication to the Commission, as required by 2 U.S.C. § 434(f). The television advertisement primarily focused on Gary Kucinich, a candidate for the Ohio State Senate, but also identified by name and

1 photograph Dennis Kucinich, Gary Kucinich's brother and a Federal candidate in Ohio's 10th
2 Congressional District. The communication was broadcast on Cleveland television stations in
3 mid-October 2008, less than 60 days before the 2008 general election, and therefore in the
4 electioneering communications reporting timeframe. The complaint alleges that the RSCC spent
5 \$67,275 for broadcast time for the communication, an amount in excess of the \$10,000
6 electioneering communications reporting threshold.

7 In its response to the complaint, the RSCC contends that the communication is exempt
8 from the definition of an "electioneering communication" under Section 100.29(c)(5), which
9 exempts advertising paid for by state and local candidates in connection with their state and local
10 elections. The RSCC asserts that because the communication was paid for from an RSCC fund
11 operated for the exclusive benefit of state candidates, and because under Ohio law it amounted to
12 an in-kind contribution to Gary Kucinich's opponent Thomas Patton, it should be considered to
13 be exempt as "paid for by a candidate for State or local office in connection with an election to
14 State or local office." Response at 2. Respondents also claim that the portion of the
15 communication featuring the name and photograph of a Federal candidate was less than one
16 second of a thirty-second advertisement,¹ and that under 11 C.F.R. § 106.1(a), which provides
17 for the allocation of "expenditures" made on behalf of more than one clearly identified Federal
18 candidate, only the cost of that portion of the communication may be attributed to the Federal
19 candidate. According to the RSCC, the resulting allocated expenditure is far less than the
20 \$10,000 threshold required to trigger the "electioneering communication" reporting requirement.
21 *Id.* at 3.

¹ Our review of the advertisement indicates that Dennis Kucinich is shown on the screen for 4 seconds, or 13% of the ad's 30-second running time.

1 Based on available information, it appears that the television advertisement in this matter
2 is an electioneering communication as defined by 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29
3 and does not qualify for any exemption under 11 C.F.R. § 100.29(c). In addition, it appears that
4 the cost of producing and airing the electioneering communication exceeded \$10,000.
5 Therefore, the Respondents were subject to the reporting requirements of the Federal Election
6 Campaign Act of 1971, as amended ("the Act"), but failed to disclose the communication to the
7 Commission within 24 hours of each disclosure date. Finally, it appears that that the
8 Respondents did not include a proper disclaimer within the communication.

9 Accordingly, we recommend that the Commission find reason to believe that the
10 Republican Senate Campaign Committee and J. Matthew Yuskewich, in his official capacity as
11 treasurer, violated 2 U.S.C. § 434(f) by failing to disclose the electioneering communication, and
12 2 U.S.C. § 441d by failing to include a proper disclaimer within the communication.

13 **II. FACTUAL AND LEGAL ANALYSIS**

14 **A. The RSCC**

15 The RSCC is a "legislative campaign fund" as defined by Ohio statute. See Ohio Rev.
16 Code § 3517.01(B)(15)(a "legislative campaign fund" is established as an auxiliary of a state
17 political party and associated with one of the houses of the [Ohio] general assembly). Under
18 Ohio statute, each State political party is authorized to have one legislative campaign fund for
19 each house of the general assembly. Ohio Rev. Code § 3517.10(D)(3)(d). The purpose of the
20 fund is to receive contributions and make disbursements furthering the election of candidates
21 who are members of that political party to the house of the general assembly with which the
22 legislative campaign fund is associated. *Id.* The funds are held separate from the state party's
23 funds, and are administered and controlled "in a manner designated by the [State] caucus." Ohio

1 Rev. Code § 3517.10(D)(3)(d). The "caucus" is defined as all of the members of the Ohio house
2 of representatives or all of the members of the Ohio state senate from the same political party,
3 and for the purpose of administering these funds, includes the chairperson of the state political
4 party, or the chairperson's designee. *Id.*

5 **B. "Oh, Brother" Television Advertisement**

6 The RSCC produced a television advertisement entitled "Oh, Brother" critical of Gary
7 Kucinich, a candidate for Ohio's 24th District State Senate Seat and the brother of U.S.
8 Representative Dennis Kucinich from Ohio's 10th Congressional District. Gary Kucinich's
9 opponent for the State Senate seat was Thomas Patton.

10 The advertisement opens with a photograph of Dennis Kucinich and a voiceover states,
11 "Oh, brother. Dennis Kucinich's brother is running for State Senate." After four seconds, the
12 picture of Dennis Kucinich is replaced by a picture of Gary Kucinich, and this photograph
13 remains the background for the remainder of the advertisement. The voiceover continues,
14 discussing Gary Kucinich's "failed record" while serving as a member of the Cleveland School
15 Board in the early 1990s. The advertisement concludes with a quotation from an editorial
16 published in the Cleveland *Plain Dealer* in 1992 stating that Gary Kucinich "represents a failed
17 past," and the voiceover says "Oh, brother is right. We don't need Gary Kucinich in the State
18 Senate." The disclaimer states that the advertisement was paid for by the RSCC. The transcript
19 of the advertisement follows:
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On Screen

Voiceover

Oh, Brother. . .	Oh, brother.
Photograph of Dennis Kucinich	Dennis Kucinich's brother, Gary, is running for state senate.
Photo of and text Gary Kucinich Running for State Senate	
Gary Kucinich Failed Record	Maybe Gary Kucinich thought we'd forgotten about his failed record.
Gary Kucinich While a member of the Cleveland School Board: voted to fire 226 teachers Resolution No. 374-91	Like when Kucinich was on the Cleveland School Board and voted to fire 226 teachers . . .
Gary Kucinich While a member of Cleveland School Board: District mishandled funds State Audit for Fiscal Years 1990, 1991, 1992 and 1993	. . . or when the School District was cited for mishandling funds when Gary Kucinich was on the board.
Gary Kucinich The Plain Dealer "Kucinich represent[s] a failed past that the community no longer endorses." Editorial 4/8/92	The Plain Dealer says Kucinich represents a failed past.
Gary Kucinich We Don't Need Gary Kucinich in the State Senate Paid for by RSCC/ J. Matthew Yuskewich, Treas. 4679 Winteret Drive/Columbus, OH 43220	Oh, brother is right. We don't need Gary Kucinich in the State Senate.

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The RSCC claims that Patton was involved in the production of the advertisement and

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authorized the RSCC to act on his behalf. The Respondents do not explain how Patton

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participated in the production or broadcast of the advertisement.

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Available information suggests that the advertisement aired on the Cleveland, Ohio, FOX

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and NBC affiliates in mid-October 2008. We are unable to ascertain which of the RSCC's

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disclosed disbursements for television expenses on its state disclosure reports were made for the

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production and broadcast of the "Oh, Brother" advertisement. Ohio Secretary of State, Election

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1 Division, <http://www.sos.state.oh.us>. The complaint alleges that the RSCC paid "at least"
2 \$67,275 for airtime to the two television affiliates. The Respondents do not contradict this
3 amount.

4 **C. The Advertisement is an Electioneering Communication**

5 The "Oh, Brother" advertisement is an electioneering communication as defined by
6 2 U.S.C. § 434(f)(3)(A)(i) and 11 C.F.R. § 100.29 and does not appear to qualify for any
7 exemption from the electioneering communication definition under 11 C.F.R. § 100.29(c). An
8 electioneering communication is a "broadcast, cable or satellite communication" that: (1) refers
9 to a clearly identified candidate for Federal office; (2) is made within 60 days before a general
10 election or 30 days before a primary election; and (3) is targeted to the relevant electorate.
11 2 U.S.C. § 434(f)(3)(A)(i); *see also* 11 C.F.R. § 100.29(a). A clearly identified candidate means
12 that the candidate's name, nickname, photograph or drawing appears, or the identity of the
13 candidate is otherwise apparent through an unambiguous reference. 11 C.F.R. § 100.29(b)(2). A
14 communication is "targeted to the relevant electorate" when it can be received by 50,000 or more
15 persons in the district the candidate seeks to represent. 11 C.F.R. § 100.29(b)(5).

16 The "Oh, Brother" advertisement clearly identifies by name and photograph
17 Congressman Dennis Kucinich, who was seeking re-election in Ohio's 10th Congressional
18 District.² In addition, it appears that the advertisement was broadcast on two Cleveland network
19 affiliates in mid-October, which was within 60 days of the 2008 general election. According to
20 the Federal Communications Commission, a broadcast publicly distributed by Cleveland's Fox
21 and NBC affiliates is capable of reaching over 50,000 or more persons in Ohio's 10th

² Dennis Kucinich also sought the Democratic Party's nomination for the office of President of the United States. However, he withdrew from the race on January 24, 2008, before the advertisement at issue was produced or disseminated.

1 Congressional District. *See* 11 C.F.R. § 100.29(b)(6)(i)(information on the number of persons in
2 a Congressional district that can receive a communication publicly distributed by a television
3 station is available on the Federal Communications Commission's website at www.fcc.gov).

4 Respondents' response to the complaint hinges, in part, on the application of the
5 "candidate communication" exemption to the definition of electioneering communications. *See*
6 11 C.F.R. § 100.29(c)(5). Under the Commission's regulation, a communication is exempt from
7 the definition of an "electioneering communication" if it satisfies a two-part test. First, the
8 communication must be paid for by a candidate for State or local office in connection with an
9 election to State or local office. *Id.* Second, the communication may not promote, support,
10 attack or oppose any Federal candidate. *Id.* In its Explanation and Justification, the Commission
11 explains that it promulgated this exemption to cover communications by State and local
12 candidates and officeholders that refer to a clearly identified Federal Candidate, provided that the
13 mention of the Federal candidate is "merely incidental" to the candidacy of an individual for
14 State office, and does not promote, support, attack or oppose the Federal candidate. 67 Fed. Reg.
15 65190 (Oct. 23, 2002).

16 While Respondents acknowledge that Patton did not directly pay for the "Oh, Brother"
17 ad, they argue that the communication is exempt under the "candidate communication" provision
18 because, under Ohio law, the cost of the communication was effectively an expenditure by the
19 candidate. Specifically, Respondents assert that under Ohio law (Ohio Rev. Code
20 § 3517.01(B)(16)), RSCC's coordinated expenditures made on behalf of Patton were "in-kind
21 contributions" to Patton which are considered an "expenditure by the candidate" for state
22 reporting purposes. Thus, respondent urges the Commission to view the communications as
23 "paid for" by Patton, even though the funds originated with the RSCC.

1 Although Respondents contend that the funds were effectively spent by the candidate, the
2 "Oh, Brother" advertisement is not exempt as an electioneering communication because the
3 exemption is not applicable to in-kind contributions or other indirect support by party
4 committees. Although the RSCC operates for the benefit of Ohio State Senate candidates and is
5 authorized to make expenditures on their behalf, the RSCC is a "legislative campaign fund" and
6 is not a "state or local candidate." As a legislative campaign fund, the RSCC is administered and
7 controlled by the Ohio State Republican Party, a type of entity which the Commission
8 determined would not be eligible for an exemption from the electioneering communications
9 provisions. See 67 Fed. Reg. 65199 (Oct. 23, 2002) (when promulgating the "candidate
10 communication" exemption to the definition of electioneering communication, the Commission
11 considered but declined to include a specific exception for communications funded by State and
12 local political parties).³

13 **D. The Electioneering Communication is Subject to Reporting Requirements**

14 Because the "Oh, Brother" advertisement is an electioneering communication, the
15 Respondents were subject to electioneering communication reporting requirements under
16 2 U.S.C. § 434(f) and 11 C.F.R. § 104.20.⁴ Every person who makes aggregate disbursements
17 exceeding \$10,000 for the cost of producing and airing electioneering communications during

³ Because the communication was not paid for by a candidate, and is therefore ineligible for an exemption under 100.29(c)(5) on that basis, the Commission does not need to reach the second part of the exemption's test, which is that the ad not promote, attack, support, or oppose a federal candidate.

⁴ Although in *Citizens United* the Supreme Court struck down as unconstitutional the Act's prohibition on corporate financing of electioneering communications at 2 U.S.C. § 441b(b)(2), see 558 U.S. ___, slip. op. at 50 (2010), the Court upheld the Act's disclosure and disclaimer provisions applicable to electioneering communications at 2 U.S.C. §§ 434(f) and 441d and 11 C.F.R. §§ 104.20 and 110.11. See *id.* at 55-56. The Court held, as it has previously, that disclaimer and disclosure requirements "may burden the ability to speak," but "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking." *Id.* at 51 (citing *McCormell v. FEC*, 540 U.S. 93, 201 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 64 (1976)). In upholding these requirements, the Court cited the public's "interest in knowing who is speaking about a candidate shortly before an election" and opined that "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Id.* at 54-55.

1 any calendar year must, within 24 hours of each disclosure date, disclose information regarding
2 the communication. This disclosure must include the identity of the person making the
3 disbursement; the identity of any person sharing or exercising direction or control over the
4 activities of such person; the amount and recipient of each disbursement over \$200; and the
5 names and addresses of contributors who give \$1,000 or more in the calendar year to the person
6 making the disbursement. 2 U.S.C. § 434(f)(2). Although we do not know the exact cost of the
7 production and broadcast of the communication, *see supra* at 5, the cost likely exceeded \$10,000.

8 Respondents argue that because a small portion of the advertisement featured a Federal
9 candidate, only the cost of that portion of the communication is an electioneering
10 communication, and therefore it did not exceed the \$10,000 threshold necessary to trigger the
11 electioneering communication reporting requirements. Response at 4-5. The Respondents rely,
12 by analogy, on 11 C.F.R. § 106.1(a), which concerns the allocation of expenditures by Federal
13 political committees made on behalf of more than one clearly identified Federal candidate.
14 However, 11 C.F.R. § 106.1(a), itself, does not apply to the "Oh, Brother" advertisement because
15 the RSCC is not a Federal political committee with Federal accounts for allocation purposes and,
16 in this case, the "Oh, Brother" advertisement does not refer to multiple Federal candidates. In
17 addition, section 106.1 acts to facilitate disclosure of disbursements made on behalf of federal
18 candidates, but the RSCC seeks to use the regulation for an opposite purpose; to avoid
19 disclosure. Finally, neither the Act nor the Commission's regulations set forth rules allowing for
20 the allocation of the costs of an electioneering communication by the amount of time spent on
21 different candidates. Therefore, no allocation regulations apply to the "Oh, Brother"
22 communication and the Respondents were subject to the reporting requirements set forth in the

1 Act and the Commission's regulations.⁵

2 Accordingly, we recommend that the Commission find reason to believe that the
3 Republican Senate Campaign Committee and J. Matthew Yuskewich, in his official capacity as
4 treasurer, violated 2 U.S.C. § 434(f) by failing to disclose an electioneering communication.

5 **E. The Electioneering Communication is Subject to Disclaimer Requirements**

6 The Act requires that when a political committee makes a disbursement for the purpose
7 of financing an electioneering communication, the communication shall include a disclaimer that
8 clearly states whether it was paid for or authorized by a candidate or a candidate's authorized
9 political committee. 2 U.S.C. § 441d(a)(1) and 11 C.F.R. § 110.11(a)(4) and (b). If the
10 communication is not paid for or authorized by a candidate or the candidate's authorized political
11 committee, the disclaimer must clearly state the full name and permanent address, telephone
12 number, or World Wide Web address of the person who paid for the communication, and a
13 statement that it is not authorized by any candidate or candidate's committee. *Id.* If the
14 communication is transmitted through television, the disclaimer must be transmitted via written
15 and audio statement. 11 C.F.R. § 110.11(c)(4). In order to be clearly readable, the written
16 statement must be greater than four percent of the vertical picture height and must be visible for
17 at least four seconds. *Id.* Finally, the audio statement must be conveyed with an unobscured
18 full-screen view of a representative from the political committee. *Id.*

19 While the communication in question does contain a clearly readable written disclaimer
20 with a picture of the Committee's treasurer, it fails to state that the mailer was not authorized by
21 any candidate or any candidate's authorized committee. 11 C.F.R. § 110.11(a)(4) and (b). In

⁵ Even if the Commission's regulations had provided for allocation between candidates to determine whether an electioneering communication reporting threshold is satisfied, (in this case, possibly 13% of the ad's costs, which is the percentage portion of time Dennis Kucinich's image appears on screen), an accurate calculation could not be made until the total cost of the ad is confirmed.

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1 addition, the Committee did not comply with the audio disclaimer requirements, in that the audio
2 statement "_____ is responsible for the content of this advertising," along with a full-
3 screen view of the Committee's representative and a statement that no candidate or authorized
4 candidate's committee paid for or authorized the communication, is not included in the
5 communication. Therefore, we recommend that the Commission find reason to believe that the
6 Republican Senate Campaign Committee and J. Matthew Yuskewich, in his official capacity as
7 treasurer, violated 2 U.S.C. § 441d by failing to include a proper disclaimer in the
8 communication.

9 **III. INVESTIGATION**

10 We contemplate a limited investigation to seek additional information _____
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18 **IV. RECOMMENDATIONS**

- 19 1. Find reason to believe that Republican Senate Campaign Committee and J.
20 Matthew Yuskewich, in his official capacity as treasurer, violated 2 U.S.C.
21 §§ 434(f) and 441d;
22
23 2. Approve the attached Factual and Legal Analysis;
24
25 3. Authorize compulsory process; and

4. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

Date

4/19/10

BY:

Ann Marie Terzaken
Associate General Counsel
for Enforcement

Peter G. Blumberg
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Wanda B. Brown
Attorney

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